UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HENRY WESSELIUS, Plaintiff, v. LINDA S. McMAHON, Acting Commissioner, Social Security Administration,[1] Defendant.	Case No. C06-571-RSM-JPD REPORT AND RECOMMENDATION

Plaintiff Henry Wesselius appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner"), which denied plaintiff's application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, 1381 *et seq.*, after a hearing before an Administrative Law Judge ("ALJ"). For the reasons set forth below, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further proceedings not inconsistent with the Court's instructions.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a forty-seven year old divorced man with a high school education.

[1] On January 20, 2007, Linda S. McMahon became the Acting Commissioner of the Social Security Administration. Therefore, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Linda S. McMahon is substituted for Commissioner Jo Anne B. Barnhart as the defendant in this suit.

Administrative Record ("AR") at 494-95. He has previously worked as a janitor, forklift operator, dairy farm worker, warehouseman, telemarketer, dishwasher, laundry worker, and casino maintenance man. AR at 81-87, 493. Plaintiff was last gainfully employed in 2002. AR at 466, 488. He has a history of drug and alcohol abuse, but has participated in rehabilitation programs and asserts that he no longer has a substance abuse problem. AR at 476.

On October 24, 2002, plaintiff applied for DIB and SSI benefits based on physical and mental impairments, alleging an onset date of July 5, 2002. AR at 66-72, 440. Plaintiff asserts that several mental impairments, including as bipolar disorder, psychotic disorders, personality disorders, affective disorders, organic brain disorders, substance abuse disorder, and borderline intellectual functioning, as well as physical disorders including seizure disorders, hepatitis, and arthritis have kept him from obtaining and maintaining employment of any kind. AR at 72, 101, 114-23, 127-34, 468-69; Dkt. No. 13.

The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 32-35, 38-40. On March 7, 2005, a disability hearing was held before the ALJ, who eventually concluded that plaintiff was not disabled and denied benefits based on his finding that plaintiff could perform a specific job existing in significant numbers in the national economy. AR at 21-29. Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 6-8, making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On May 15, 2006, plaintiff timely filed the present action challenging the Commissioner's decision. Dkt. No. 3.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of

social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, settling conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to meticulously examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence of record is susceptible to more than one rational interpretation, it is the Commissioner's conclusions that must be upheld. *Id.*

IV. EVALUATING DISABILITY

As the claimant, Mr. Wesselius bears the burden of proving that he is disabled within the meaning of the Social Security Act ("the Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505(a), 416.905(a). A claimant is disabled under the Act only if his impairments are of such severity that he is unable to do his previous work, and cannot, considering his age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one to four. At step

five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled or not disabled at any step in the sequence, the inquiry ends without need to consider subsequent steps.

Step one asks whether the claimant is presently engaged in "substantial gainful activity." 20 C.F.R. §§ 404.1520(b), 416.920(b).[2] If he is, disability benefits are denied. If he is not, the Commissioner proceeds to step two. At step two, the claimant must establish that he has one or more medically severe impairments, or combination of impairments, that limit his physical or mental ability to do basic work activities. If the claimant does not have such impairments, he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to step three to determine whether that impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or equals a listing for the twelve-month duration requirement is disabled. *Id.*

When the claimant's impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step four and evaluate the claimant's residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether he can still perform that work. *Id.* If the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true, the burden shifts to the Commissioner at step five to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the Commissioner finds the claimant is unable to perform other work, the claimant is disabled and benefits may be awarded.

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[2] Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

V. DECISION BELOW

On May 27, 2005, the ALJ issued a decision denying plaintiff's request for benefits, which found:

1. The claimant met the insured status requirements of the Act on June 5, 2002, alleged onset date, and he has sufficient quarters of coverage to remain insured through at least March 31, 2008.

2. The claimant has not engaged in substantial gainful activity since the alleged onset date.

3. The claimant has depression, anxiety, and a substance abuse disorder. These impairments are severe, but they do not meet or equal the criteria of any impairment listed in Appendix No. 1.

4. The claimant's statements concerning his impairments and limitations are not entirely credible.

5. The claimant retains the residual functional capacity to perform medium work. He can walk ½ mile, stand 6 hours in an 8-hour workday; walk 4 hours in a workday, and sit two hours in a workday. He has no postural, manipulative, or environmental restrictions. He can understand and remember simple and detailed tasks. He can sustain work activity during a 40-hour workweek, most of the time. He gets along with others and has the ability to take precautions as needed.

6. The claimant's impairments and limitations preclude his past relevant work.

7. The claimant was born on July 5, 1959; he has at least a high-school education.

8. If the claimant could perform a full range of medium work, 20 C.F.R. §§404.1569, 416.969 and rule 203.29 of Appendix 2 would direct a conclusion that the claimant is not disabled.

9. Although claimant is unable to perform a full range of medium work, he is capable of working as a night patrol worker. He is therefore not disabled within a framework of the above-cited rules.

10. The claimant is not under a disability as defined in the Social Security Act.

AR at 28.

VI. ISSUES ON APPEAL

The parties vigorously dispute the ALJ's step two finding that plaintiff had or did not have the "severe" impairments of depression, anxiety, and substance abuse order, as well as the

ALJ's pivotal step five finding that plaintiff could perform other work existing in significant numbers in the national economy, i.e., as a "night patrol worker." AR at 28. There are three primary allegations of error:

1. Did the ALJ Fail to Provide Legally Sufficient Reasons for Rejecting the Medical Opinion Evidence of Dr. Willner, Dr. Avery, Dr. Horton, and Dr. Valeithian?

2. Did the ALJ Fail to Follow the "Special Technique" for Evaluating the Severity of Mental Impairments?

3. Did the ALJ Err in Assessing the Plaintiff's Credibility?[3]

VII. DISCUSSION

A. The ALJ Failed to Provide Legally Sufficient Reasons for Rejecting the Medical Opinion Evidence of Dr. Willner, Dr. Avery, and Dr. Horton

Relevant medical evaluations of the following physicians were before the ALJ at the time of plaintiff's March 7, 2005, disability hearing: treating physician Dr. Andrew Willner (AR at 135-47, 174-81, 188-201); treating physician Dr. Marc Avery (AR at 182-85); and examining physician Dr. John Horton (AR at 388-409). The ALJ also reviewed reports of consulting physicians Drs. Michael Rosenfield and Nandan Kumar (AR at 127-30, 131-34), certain counselors at Valley Cities Counseling and Consultation (AR at 202-387), and several other non-examining state agency physicians and psychologists. *See* AR at 150-164, 165-70. A final examination, completed by Dr. Cherie Valeithian, was submitted to the Appeals Council shortly after the ALJ issued his decision. AR at 451-59. The plaintiff's argues that the

[3] In addition to the foregoing assignments of error, Plaintiff spent considerable effort arguing that the ALJ erred by not making a transferable skills finding to justify his determination of non-disability at step five, and consequently, erred by finding that plaintiff could perform work as a "night patrol worker" despite finding that plaintiff had no transferrable skills. The Commissioner did not substantively respond to this argument, and the Court eschews an exhaustive analysis of its merits. Put simply, with respect to persons who are "younger individuals" as defined the Act (i.e., 18-49 years of age), the issue of transferability of skills is not critical to a determination of disability. *See* 20 C.F.R., Pt. 404, Subpt. P, App. 2, Rule 201.20, 201.22, 203.29-.31.

ALJ failed to give proper weight to the opinions of Drs. Willner, Avery, Horton, and Valeithian, and rejected those opinions without a "clear and convincing" or "specific and legitimate" basis. Dkt. No. 13 at 8-11. The Commissioner disagrees, insists that those medical conclusions are controverted, and argues that the ALJ's reasons for rejecting them were specifically outlined and sufficiently legitimate. Dkt. No. 15 at 6-9.

As a matter of law, more weight is given to a treating physician's opinion than to that of a nontreating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751. "Likewise, greater weight is accorded to the opinion of an examining physician than a non-examining physician." *Andrews*, 53 F.3d at 1041; *see also* 20 C.F.R. § 416.927(d)(1). However, under certain circumstances, an examining physician's opinion can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). "This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his conclusions. "He must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at 725.

1. *Dr. Willner*

Dr. Willner, as plaintiff's primary treating physician, examined the plaintiff on numerous occasions prior to February 20, 2004, and December 3, 2004. *See* AR at 135-47 (chronicling multiple visits as far back as July 2002 for, among other things: fever, chest congestion, flu, diarrhea, dyspepsia, sinusitis, psychosis, bipolar disease, paranoid thoughts,

depression, and schizophrenia vs. bipolar disorder). However, the latter two examination dates, as well as a November 12, 2002 summary, bear primary significance to the present case. AR at 135-47, 174-81, 188-201. In a November 12, 2002 letter to the Division of Disability Determination Services, Dr. Willner noted that plaintiff was "an unfortunate male with . . . hepatitis, bipolar disease, seizure disorders and polyarthritis probably associated with degenerative changes as well as the immune arthritis associated with hepatitis." AR at 141.

On February 20, 2004, Dr. Willner diagnosed plaintiff with personality disorder, seizure disorder, hepatitis B and C, and hypertension. AR at 179. He determined that plaintiff was "chronically mentally ill." AR at 180. Dr. Willner's evaluation of the plaintiff was recorded, in part, on a Psychological/Psychiatric Evaluation form provided by the Department of Social and Health Services (DSHS), wherein he found that plaintiff had high degrees of limitation in many areas of mental functioning, including markedly severe social withdrawal, moderately depressed mood, thought disorder, and paranoid behavior. AR at 179. Dr. Willner also found significant functional limitations imposed by plaintiff's diagnosed conditions (particularly his personality and thought disorders), including a severe limitation in the ability to exercise judgment and make decisions, a marked limitation in the ability to respond appropriately to and tolerate the pressure and expectations of a normal work setting, moderate limitations in six areas,[4] and a mild limitation in the ability to understand, remember and follow simple instructions. AR at 180. At plaintiff's disability hearing, the Vocational Expert (VE) testified that an individual who suffered from the above-mentioned functional impairments, particularly the marked impairment in ability to respond appropriately to work pressures in a normal work setting, would not be able to maintain competitive employment. AR at 504-05. Similar conclusions were made after Dr. Willner's December 3, 2004 examination of the plaintiff, the

[4] These areas included (1) the ability to understand, remember and follow complex instructions; (2) the ability to learn new tasks; (3) the ability to perform routine tasks, (4) the ability to relate appropriately to co-workers and supervisors; (5) the ability to interact appropriately in public contacts; and (6) the ability to care for oneself. AR at 180.

result of which was recorded by a brief medical summary and use of a Psychiatric Review Technique Form (PRTF) provided by the SSA. *See* AR at 178-81, 188-201. Specifically, Dr. Willner diagnosed plaintiff with personality disorder, organic mental disorders, seizure disorder, hepatitis, schizophrenic and psychotic disorders, and substance addiction disorder. AR at 188-97. As to functional limitations, Dr. Willner found that plaintiff had marked difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace, mild restrictions in activities of daily living, and three repeated episodes of decompensation, each of extended duration. AR at 198.

The ALJ rejected Dr. Willner's February 2004 and December 2004 opinions on the grounds that they were rendered on insufficient "check-box forms without supporting observations" and were "contradicted by the claimant's significantly improved functioning noted by Valley Cities counselors" and by Dr. Willner's October 29, 2002 office notes. AR at 24-25 (citing Exs. 20F and 3F:5, AR at 139).

The ALJ erred. Even assuming that Dr. Willner's February 2004 and December 2004 opinions were controverted, the ALJ's rejection of those opinions was neither specific nor legitimate; nor was it supported by substantial evidence. Check-the-box type forms may be entitled to less weight when they are not adequately explained or supported by treatment notes, but that was not the case here. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). The DSHS and SSA forms utilized by Dr. Willner may appear uninformative to the layperson, but such forms are concrete, meaningful, and highly probative in the social security context, especially when completed by a physician who has treated plaintiff on dozens of occasions and gave a diagnosis consistent with a majority of all other physicians who treated or examined plaintiff. Moreover, neither the ALJ nor the VE expressed any failure to comprehend the information contained in those forms. *See* 20 C.F.R. § 404.1512(e)(1) ("When the evidence [the Commissioner] receive[s] from [the claimant's] treating physician or psychologist or other medical source is inadequate for [the Commissioner] to determine whether [the claimant is]

disabled," it will "recontact [that] medical source"). Furthermore, the forms contained several handwritten notes and were consistent with several pages of Dr. Willner's notes taken over the course of several years.

In addition, while the ALJ concluded that Dr. Willner's office notes from prior visits contradicted the February 2004 and December 2004 opinions, the notes the ALJ cited do not rationally support this conclusion. AR at 25 (citing "3F:5," located at AR at 139) (summarizing plaintiff's December 20, 2002 visit for paranoid thoughts and request for various injections and prescriptions "to cleanse his body"); *see Thomas*, 278 F.3d at 954 ("Where the evidence is susceptible to more than one *rational* interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld.") (emphasis added). Even the most persuasive office memo noticed by this Court—not cited by the ALJ—merely explains that plaintiff "[i]s anxious to get on treatment for his mood depressions . . . has long-term treatment with Nortriptyline but nowhere near the success absent the mood stabilizer Lithium that he requests today." AR at 142. A physician's notation that a patient's symptoms are *not* treated successfully with current medications likely can only bolster, not diminish, that physician's finding of severe impairments. Regardless, it certainly does not constitute a specific or legitimate reason supporting rejection of Dr. Willner's opinion in this circumstance. Moreover, contrary to the Commissioner's assertions, nowhere in the record does Dr. Willner state that plaintiff's mental impairments were "well controlled by medication." Dkt. No. 15 at 8.[5] "[O]nly by . . . mischaracterizing [Dr. Willner's] statements can one create any apparent inconsistency" or limitation in his diagnoses. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.

[5] To be sure, the office notes referenced by the Commissioner for this proposition do not even address mental impairments. Rather, the notes reflect treatment for nausea, cramping, and diarrhea. AR at 138. Moreover, contrary to the arguments of the Commissioner, nowhere on page 139 of the administrative record did Dr. Willner report the absence of "any physical or mental impairment." Dkt. No. 15 at 8. Nor was this finding made on page 140, which consists of a half-sized piece of paper evidencing a Dr. James E. Clark's treatment of plaintiff for sinusitis. AR at 140.

1996). The ALJ will have the opportunity to specifically clarify and readdress any allegedly conflicting statements by Dr. Willner on remand.

Finally, to the extent that the ALJ found (and persists in finding on remand) that plaintiff's mental functioning "improved" after extended counseling at Valley Cities from July 2003 to December 2004 (AR at 318, 272),[6] the ALJ should determine on remand whether this information alone justifies a finding of nondisability for the entire period adjudicated, or whether a closed period of disability is appropriate. *Moore v. Commissioner*, 278 F.3d 920, 924 (9th Cir. 2002).

2. *Dr. Avery*

Plaintiff was evaluated by treating psychiatrist Dr. Avery of Valley Cities Counseling and Consultation in April 2004. Dr. Avery's evaluation was recorded on a Psychological/Psychiatric Evaluation form provided by DSHS. He opined that plaintiff was chronically mentally ill, and diagnosed dysthymic disorder and possible dementia and borderline intellectual functioning.[7] Dr. Avery's mental functioning findings were strikingly similar to that of Dr. Willner, including marked social withdrawal and moderate levels of depressed mood, thought disorder, and paranoid behavior. AR at 183. He also found marked motor retardation, moderate motor agitation and verbal expressions of anxiety or fear, and mild degrees of suicidal trends, expressions of anger, hallucinations, hyperactivity, and physical complaints. AR at 183. Dr. Avery's functional limitations assessment was also similar to Dr. Willner's. For example, Dr. Avery also found marked limitations in plaintiff's ability to respond appropriately to and tolerate the pressure and expectations of a normal work setting, and identical moderate limitations as that of Dr. Willner. AR at 184. Dr. Avery further

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[6] The "significantly improved functioning" referred to by the ALJ appears to have come from isolated usages of the terms "much improvement," "improving," and "focus improving" in approximately five of the thirty-nine weekly "Group Participation" forms completed by Valley Cities counselor Dr. Paul T. Kern. *See* AR at 272, 280, 302, 318, 320.

[7] Dr. Avery attributed plaintiff's dementia to chronic substance abuse. AR at 198.

explained that while prescribed medication could reduce the symptoms of plaintiff's mental disorders, it could "not affect day to day work due to [plaintiff's] limited intellectual functioning." AR at 184.

The ALJ rejected Dr. Avery's opinions in one sentence, noting that there was no testing to support Dr. Avery's diagnosis of borderline intellectual functioning. AR at 24. While the ALJ stated that he gave Dr. Avery's mental and social functioning assessments "some weight," none of Dr. Avery's findings were adopted by the ALJ. Assuming *arguendo* that Dr. Avery's opinion was controverted by that of the state agency physicians, the ALJ was nonetheless required to analyze the opinion. *Andrews*, 53 F.3d at 1043. The ALJ had the discretion to reject Dr. Avery's opinion "in favor of the conflicting opinion of another examining physician," but only after "findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The ALJ failed to do so; his reasons were neither specific nor legitimate. On remand, the ALJ should reassess the findings of Dr. Avery who is, after all, one of the Valley City counselors, the opinions of which the ALJ purportedly assigned greater weight to than plaintiff's other sources. *See, e.g.*, AR at 25.

3. *Dr. Horton*

In January 2005, examining psychiatrist Dr. Horton completed a detailed report, a medical source statement, and a PRTF after his examination of the plaintiff. AR at 388-409. Dr. Horton gave DSM-IV Axis I diagnoses of schizophrenia, schizoaffective disorder, substance-abuse persisting amnestic disorder, and substance dependence in early full or full sustained remission; Axis III diagnoses included seizure disorder and hypertension. AR at 393. He reported a current Global Assessment of Functioning (GAF) score of 45. AR at 393.[8] Dr.

[8] The GAF is a subjective determination based on a scale of 1 to 100 of "the clinician's judgment of the individual's overall level of functioning." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (Text. Rev., 4th ed. 2000). A GAF score of 51-60 indicates "moderate symptoms," such as a flat affect, occasional panic

Horton's written report stated that plaintiff would "have difficulty understanding and carrying out even simple instructions, . . . difficulty relating to others in a work environment," and concluded that plaintiff "d[id] not seem capable of withstanding the stress and pressures related to work activity at this time because of his mental problems . . . ." AR at 393-94; *see also* AR at 394 ("Given the long duration of his problems and the fact that he has been in ongoing treating, his prognosis seems very poor."). Dr. Horton's medical source statement found marked (or "severe") limitations in nine of ten mental and social functioning categories. *See* AR at 395-96. His PRTF revealed similar conclusions and, like that of Dr. Willner, determined that plaintiff satisfied the requirements of at least two step-three mental impairment listings. AR at 397. Regarding "B Criteria" listings, Dr. Horton found that plaintiff had marked difficulties in every area of functioning, including activities of daily living, maintaining concentration, persistence or pace, and maintaining social functioning. AR at 407.

The ALJ rejected Dr. Horton's assessment because "it was based on a one-time examination," appeared inconsistent with the claimant's observed functioning by the Valley Cities counselors, and failed to specify the level of functional difficulty plaintiff encountered with regard to simple instructions, relating to others, and managing stress and work pressures. AR at 25.

This, too, was reversible error. First, contrary to the ALJ's assertions, Dr. Horton *did* specify the level of restrictions associated with each relevant work-related mental activity. That is, after his clinical interview and review of all medical records, Dr. Horton's medical source statement found *marked* limitations in plaintiff's ability to (1) understand and remember short, simple instructions or detailed instructions; (2) carry out the same; (3) interact appropriately with the public, supervisors, or co-workers; (4) respond appropriately to work pressures in a usual work setting; and (5) respond appropriately to changes in a normal work setting. AR at

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attacks, or "moderate difficulty in social or occupational functioning." *Id.* at 34. A GAF score of 41-50 indicates "[s]erious symptoms . . . [or] serious impairment in social, occupational, or school functioning," such as the lack of friends and/or the inability to keep a job. *Id.*

395-96. To the extent this assessment was overlooked, or to the extent the conclusion of unspecificity was made by the ALJ himself, it must be corrected upon remand, as an ALJ cannot substitute his own opinion for that of a medical expert by ignoring, disregarding, or manipulating the evidence of record. *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). Second, the Court finds that the "observed functioning" of the plaintiff by Valley Cities counselors, standing alone, does not contain the specificity necessary to outweigh the opinions of Dr. Horton. *Widmark v. Barnhart*, 454 F.3d 1063, 1067 (9th Cir. 2006) ("The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of . . . an examining physician.") (internal quotation omitted).[9] Third and finally, the fact that Dr Horton performed a one-time examination is not a legitimate reason for rejecting his opinions. Examining physicians are paid to perform one-time examinations. Furthermore, Dr. Horton has never been cast by either party as a treating physician, whose opinions are entitled to "special weight" and accorded significant deference. *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).

4. *Dr. Valeithian*

The results of Dr. Valeithian's June 2005 and July 2005 diagnostic assessments, psychological/psychiatric evaluation, and comprehensive trail-making test were, in many ways, more profound than the opinions of Drs. Willner, Avery, or Horton. The Court finds that this new medical evidence is material, in that there exists a "reasonabl[e] possibility that the new evidence would have changed the outcome of the [disability] determination." *Bruton*, 268 F.3d at 827 (internal quotation omitted, first alteration added by *Bruton* court). However, in light of the foregoing errors, it is not necessary to explore plaintiff's argument regarding Dr.

[9] This is especially true where the consultative Valley Cities physicians, unlike Drs. Willner, Avery, and Horton, failed to include a complete assessment of plaintiff's functional limitations as required by the Social Security Act. *See* 20 C.F.R. § 404.1519n(c)(6) ("A complete consultative examination . . . *should* include the following elements . . . in cases of mental impairment(s)[:] the opinion of the medical source about [the claimant's] ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers and work pressures in a work setting.") (emphasis added).

Valeithian in detail. The Commissioner is correct that the ALJ did not have the benefit of Dr. Valeithian's opinion before issuing his May 7, 2005 decision. He will, however, have ample opportunity to address it on remand.

B. The ALJ Failed to Properly Follow the "Special Technique" For Evaluating the Severity of Mental Impairments

Plaintiff argues that the ALJ committed reversible error by not evaluating plaintiff's mental impairments pursuant to 20 C.F.R. § 404.1520a, rendering his decision unreviewable. Dkt. No. 13 at 17. The Commissioner insists that the ALJ adopted the findings of the state agency physicians to satisfy this requirement. Dkt. No. 15 at 12.

In evaluating the severity of mental impairments, a "special technique" must be performed at each level of administrative review. 20 C.F.R. §§ 404,1520a(a), 416.920a(a). In *Gutierrez v. Apfel*, 199 F.3d 1048 (9th Cir. 2002), the Ninth Circuit held that an ALJ's failure to follow the § 1520a technique requires reversal when, as here, the claimant has a "colorable claim of a mental impairment." *Id*. at 1051 (construing an earlier version of § 1520a under which the ALJ was required to fill out and attach a PRTF). However, amendments to § 1520a postdating *Gutierrez* have given ALJs greater discretion in deciding how best to publish the mandated findings, but even under the amended version, the regulation requires the ALJ to follow the special technique and to "document application of the technique in the[ir] decision." 20 C.F.R. § 404.1520a(e). Specifically, the regulation requires the ALJ's decision to "include a specific finding as to the degree of mental limitation in each of the functional areas described" in § 1520a(c). 20 C.F.R. § 404.1520a(e)(2). These areas include activities of daily living; social functioning; concentration, persistence and pace; and episodes of decompensation. *Id.* § 404.1520a(c).

The ALJ did not include specific findings related to the four functional areas described in § 1520a(c). Furthermore, while the ALJ purported to give the state agency physicians' "psychological assessment" some weight, it is unclear whether such findings were adopted, and if so, to what degree. On remand, the ALJ should properly evaluate and document each of

plaintiff's colorable mental impairments in accordance with 20 C.F.R. § 404.1520a, particularly in light of the new weight due the opinions of Drs. Willner, Avery, Horton, and Valeithian.

C. The ALJ Should Re-evaluate the Plaintiff's Credibility on Remand

Because this case is being remanded for the reasons detailed above, the Court eschews a detailed analysis of the ALJ's credibility determination. In light of the fact that the Court has found that the ALJ failed to properly evaluate the opinions of Drs. Willner, Avery and Horton, the ALJ's credibility finding is also reversed and the issue remanded. After reevaluating the medical evidence of record, as expanded by opinions of Dr. Valeithian, the ALJ will be in a better position to evaluate the plaintiff's credibility.

VIII. CONCLUSION

Because the ALJ erred by failing to provide legally sufficient reasons for rejecting the medical opinions of Dr. Willner, Dr. Avery, and Dr. Horton, and erred by failing to properly follow the "special technique" for evaluating relevant mental impairments, this case should be REVERSED and REMANDED for further proceedings not inconsistent with this Report and Recommendation. In particular, the ALJ should reevaluate the medical evidence regarding plaintiff's mental and physical impairments (including the reports of Dr. Valeithian), reassess and give proper weight to the opinions of Drs. Willner, Avery, Horton, assess and give proper weight to the new opinion of Dr. Valeithian, apply the "special technique" for evaluating mental impairments under 20 C.F.R. § 416.920a, reevaluate plaintiff's RFC, and reassess plaintiff's credibility. To the extent that the plaintiff's impairments and/or limitations are modified on remand, the ALJ should propound a new hypothetical to the VE that incorporates the erroneously rejected testimony; moreover, if necessary, the ALJ should also follow the proper method for evaluating substance abuse, as outlined in *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001). With this information, the ALJ should then apply all appropriate steps of the sequential evaluation process to determine whether plaintiff's severe impairments render him disabled for purposes of Titles II and XVI of the Social Security Act. Should the

ALJ once again find that the plaintiff is not entitled to disability benefits going forward, the ALJ should determine whether the plaintiff is nonetheless entitled to benefits for any past, closed period. A proposed order accompanies this Report and Recommendation.

DATED this 12th day of February, 2007.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge